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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-609

JOSEPH H. MORTON, ET AL.,

Petitioners,

v.

CHARLES COUNTY BOARD OF EDUCATION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland is reported in 373 F. Supp. 394 (D. Md. 1974) and is set forth in Appendix C to the Petition. The United States Court of Appeals for the Fourth Circuit affirmed. Its opinion is reported in 520 F.2d 871 (4 Cir. 1975) and is set forth in Appendix A to the Petition.

JURISDICTION

Petitioners assert this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Portions of the Fourteenth Amendment, the United States Code and the Maryland Code are set forth in Appendix D to the Petition.

QUESTIONS PRESENTED

1. Are the factual premises on which petitioners' base the questions presented in the Petition contradicted by the findings of the courts below?

2. In light of the findings of the District Court that the evidence did not disclose a pattern or policy of racial discrimination and the finding of the Court of Appeals that "[t]he record solidly supports the findings of the district court," was the Court of Appeals correct in affirming the conclusion of the District Court that the so-called *Chambers* rule [364 F.2d 189 (4 Cir. 1966)] was not applicable?

3. In finding that the evidence did not disclose a pattern or policy of discrimination, did the courts below also find there was no discriminatory effect?

4. Were the courts below correct in making independent findings of fact and law based on the evidence rather than considering themselves bound by statements of an *ad hoc* committee appointed by the State Board of Education?

STATEMENT

The experienced and careful District Judge (Roszel C. Thomsen), after hearing twelve days of testimony and

considering more than 300 exhibits, as well as extensive written and oral arguments, made comprehensive findings of fact. The Court of Appeals found that "[t]he record solidly supports the findings of the district court and, assuredly, they are not clearly erroneous." App. A, p.7a; 520 F.2d at 874.

Petitioners totally disregard these findings and base their petition on assertions repudiated in the lower courts. Thus they begin their "Statement of the Case" by gratuitously asserting that the case "arises in a 'Deep South' district whose student bodies remained segregated until the late 1960s." The clear implication, fortified by a footnote, is that the Charles County Board of Education has resisted compliance with the decisions of this Court in *Brown v. Board of Education,* 347 U.S. 483 (1954) and 349 U.S. 294 (1955). To the contrary, the Charles County Board of Education voluntarily desegregated its schools following the *Brown* decisions by implementing steps which went further than those required at the time by applicable court decisions. The true facts were clearly stated in the opinion of the District Court in the following passage:

> "Charles County is a rural county, with many small communities. It is bounded on the north by Prince George's County, a much larger county, adjacent to the District of Columbia. It is bounded on the other three sides by two rural counties, Calvert and St. Mary's, and by the Potomac River. It has only recently received a substantial increase in population as a result of the expansion of the Washington suburbs.
>
> "In 1956, one year after the second *Brown* opinion, 349 U.S. 294 (May 31, 1955), the Board [of Education of Charles County] adopted a freedom of choice policy for students entering the first grade in the 1956-57 school year. All elementary grades were desegregated on a freedom of choice basis by

the 1960-61 year, all middle school grades by the 1961-62 year and all grades, including high school, by the 1962-63 year. For the 1964-65 year the Board eliminated the requirement that requests for transfers be approved, and required all parents to make an affirmative choice, in order to be sure that the right of freedom of choice was understood and exercised without restriction. That is all that was required by even the subsequent decisions of the Fourth Circuit in 1965 and 1967. *Bradley v. School Board of the City of Richmond, Virginia,* 345 F.2d 310 (April 7, 1965); *Bowman v. County School Board of Charles City County, Virginia,* 382 F.2d 326 (June 12, 1967). * * *

"The freedom of choice doctrine remained the law of the Fourth Circuit until May 27, 1968, when the Supreme Court decided *Green v. County School Board of New Kent County,* 391 U.S. 430.

"Meanwhile, in the summer of 1965 (nearly three years before the decision in *Green),* just after Starkey became Assistant Superintendent, the Board directed the staff to develop a reorganization plan for the complete integration of the system by redistricting according to geographical location, and providing for the necessary new buildings to take care of such integration as well as the increase in population of the County. The plan was adopted by the Board in October, 1965; it was implemented for the high schools for the 1966-67 school year and for the elementary schools for the 1967-68 year. App. C, pp. 21a — 23a; 373 F. Supp. at 396-97.

These findings were adopted by the Court of Appeals, which found that "unlike *Chambers* [*Chambers v. Hendersonville City Board of Education,* 364 F.2d 189 (4 Cir. 1966)] where the school system resisted 'the mandate of *Brown* until forced to do so by litigation,' . . . the Charles County Board had taken affirmative steps to desegregate its schools in the light of the evolving law and it is conceded that complete

desegregation in the county had been voluntarily accomplished in 1967." App. A, p. 5a; 520 F.2d at 873.

Petitioners then proceed to assert that in 1967 the Board of Education of Charles County suddenly changed its hiring and promotion practices so as to discriminate against black faculty and black principals. Again, the findings of the District Judge are explicit and to the contrary. The District Court found that between 1967 and the time when the present suit was heard, the number of black principals increased from 6 to 8, the number of black vice principals increased from 4 to 6, the number of black administrators in the central office rose from 4 to 10, the number of black teachers rose from 198 to 207, and "[n]o black teacher, principal, vice principal or administrator has been discharged during the years in question because of his or her race." App. C, p. 23a; 373 F. Supp. at 397. His findings continued as follows:

"Plaintiffs contend that there has been a pattern of discrimination against blacks in the hiring and promotion of principals and administrators. The evidence does not support this contention. Aside from the case of Mrs. Pinkney, discussed below, the court finds that plaintiffs have not proved that any black person was not appointed principal or administrator because of racial discrimination.

"The only occasions on which race was a controlling factor in the hiring or promotion of principals or vice principals was to carry out the policy of having a black vice principal where there is a white principal and a white vice principal where there is a black principal. The court finds that this policy at the present time in Charles County does not violate any constitutional right, and is a wise policy."

* * * * * *

> "No plaintiff contends that he or she was not appointed a teacher because of his or her race. Indeed there is no evidence that any qualified black applicant has been denied employment as a teacher." App. C, p. 24a; 373 F. Supp. at 398.

The District Court then described some of the Board of Education's affirmative efforts to recruit black faculty.

> "The recruiters have regularly visited all of the predominantly black colleges and universities in Maryland and the District of Columbia, as well as the predominantly white public colleges and universities, which are making serious efforts to obtain black students; over the years they have also visited some black colleges in other states." App. C, p. 25a, fn 9; 373 F. Supp. at 398, fn 9.

However, the District Court noted a general condition that made the Board's efforts to recruit black faculty more difficult.

> "The demand throughout the nation for qualified black teachers during the years in question has been great; Charles County offers fewer attractions for black teachers than such communities as the City of Washington and Prince George's County." App. C, p.25a; 373 F. Supp. at 398.

The fact is that the Charles County Board of Education has done a remarkably good job, and has been highly successful, in its efforts to employ and to promote black faculty and staff during a period in which the population growth in Charles County (46.4% from 1960 to 1970) had been great, but primarily white, and the percentage of the population which is black has decreased substantially. The percentage of black population in Charles County decreased between 1960 and 1970 from 34% to 29%, and the proportion of black student population decreased from 45.7% in 1960-61 to

34% in 1973-74. App. A, p. 6a; 520 F.2d at 874; App. C, p. 23a; 373 F. Supp. at 397. The 1970 Census figures showed that of the total population in Charles County 25 years of age or older with four years or more of college, an entry level requirement for teacher certification (JA 1103),* only 8.3% was black (JA 1206, 1208). Nevertheless, in 1973-74 the proportion of black professional staff overall was 29% (JA 1124), of black principals 30.77% (JA 1132), of black vice principals 46% (JA 1146), and of black central office personnel 22.2% (JA 1174), all well above the percentage of the relevant employment pool with entry level qualifications which was black. Further, as described previously, there was a notable increase in absolute numbers of black faculty and administrators over the period relevant to this case. From 1967-68 to 1973-74, the percentage of new principals who were black was 33% (JA 1139), and the percentage of new vice principals who were black was 35.3% (JA 1153).

Petitioners assert that the Court of Appeals found the decline in the proportion of black faculty was justified by the expanding white student population alone (p. 12), but this is an inaccurate and misleading characterization of the Court's opinion. The Court of Appeals, after discussing some of the statistical data in the record, stated:

> "The district court carefully analyzed the school statistics in the light of the percentage decrease of blacks in the general population as well as the school system, and also took into consideration the statistical data bearing upon the percentage of blacks in the relevant employment pool from which the School Board, of necessity, drew a substantial number of its employees." App. A, p.7a; 520 F.2d at 874.

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* ("JA") refers to the Joint Appendix filed in the Court of Appeals.

The Court of Appeals thus recognized that the District Court analyzed three categories of statistical data, not one, including the percentage of both the relevant employment pool and the general population which was black.

After discussing the statistics relied on by petitioners, Judge Thomsen reached the following conclusion:

> "The court finds that the policies of defendants with respect to the recruiting and hiring of teachers does not tend to prove a policy of racial discrimination." App. C, p. 26a; 373 F. Supp. at 399.

Many of the assertions of fact in petitioners' Statement of Facts are based on an unofficial report of four individuals who had been requested by the State Board of Education to investigate complaints made by the Charles County branch of NAACP. This *ad hoc* committee did not purport to apply constitutional or statutory principles, there was no formulation of charges, nor was any opportunity afforded to cross-examine witnesses. Nevertheless, the committee made certain findings and recommendations which were considered by the State Board of Education. The State Board did not make any determinations of fact nor did it adopt any statements of the *ad hoc* committee concerning individual incidents (JA 862-870). Rather, in its July, 1970 opinion the State Board carefully limited itself to approving, modifying or disapproving specific recommendations, and the District Court found that ". . . a good faith effort to comply with almost all of the recommendations has been made." App. C, p. 27a; 373 F. Supp. at 399. As the Court of Appeals pointed out,

> "While the district judge permitted the committee report to be introduced into evidence, he ultimately reached the conclusion that its relevant findings lacked support and made his independent findings based on the evidence before him. In doing so he acted well within the permissible area of his discretion. Even if the report were conceded some official gloss its admissibility would be highly questionable, * * * and in any event, it 'is in no sense binding on the district court and is to be given no more weight than any other testimony given at trial.'" App. A, p. 9a; 520 F.2d at 875-76.

After considering the statistical data, the evidence concerning hiring practices, the history of desegregation efforts by the Charles County Board of Education, and administrative exchanges, the District Court concluded that the evidence did not show a pattern of racial discrimination. The District Court reached this conclusion on the objective facts and did not, as alleged in the Petition, require petitioners to establish an intent to discriminate or an impermissible racial motivation. The District Court held flatly:

> "The evidence does not show a pattern of racial discrimination." App. C, p. 28a; 373 F. Supp. at 400.

The Court of Appeals agreed based on its analysis of the record. App. A, pp. 5a-7a; 520 F.2d 873-74.

ARGUMENT

The disputed issues in this case were issues of fact, not of law, and the evidence did not support the contentions of petitioners. Consequently, this case does not raise any questions which would justify review by this Court.

I.

THE FACTUAL PREMISES ON WHICH PETITIONERS BASE THE QUESTIONS PRESENTED IN THE PETITION ARE CONTRADICTED BY THE FINDINGS OF THE COURTS BELOW.

The Statement shows petitioners' characterization of the facts in this case is inaccurate, misleading and contrary to the findings of the District Court which the Court of Appeals found to be "solidly" supported by the record. The Board of Education did not resist integration, but rather implemented measures voluntarily which fully desegregated its schools in advance of judicial decisions requiring the additional measures which the Board adopted. The Board did not alter its hiring and promotion practices so as to reduce the black faculty component, but rather, as the Court of Appeals found, took ". . . reasonable and affirmative steps to bring substantial numbers of qualified blacks into every facet of the school system." App. A, p. 8a; 520 F.2d at 875. While there has been a decline in the percentage of black professional staff in recent years, it has not been precipitous, and the absolute number of black professional staff and administrators has actually increased. In light of what the Court of Appeals characterized as ". . . dramatic demographic changes which occurred in Charles County in the 1960-1970 decade" (App. A, p. 6a; 520 F.2d at 874) and considering the low percentage of blacks in the relevant employment pool, the Board has been remarkably successful in maintaining a high proportion of black administrators and teachers.

The four specific factual premises on which petitioners base their questions presented either are contradicted by the record and findings below or are misleading. First, while the percentage of black professional staff declined from 42.9% in 1966-67 to 29% in 1973-74 (JA 1124), black professional staff increased

in absolute numbers and the Court of Appeals concluded that the proportionate decline was not the result of the Board's hiring policies, saying:

> ". . . the record clearly demonstrates that the statistical changes upon which the plaintiffs rely so heavily were not the result of any discriminatory hiring policies of the Board, but rather were the result of dramatic demographic changes which occurred in Charles County in the 1960-1970 decade." App. A, p. 6a; 520 F.2d at 874.

Second, petitioners assert the Board of Education made far greater efforts to recruit whites than blacks, but the Court of Appeals concluded: ". . . the record statisfies us that despite the changing population ratio the Board has taken reasonable and affirmative steps to bring substantial numbers of qualified blacks into every facet of the school system." App. A, p. 8a; 520 F.2d at 875.

Third, petitioners claim black applicants had to meet higher qualification standards, but this assertion is not supported on the record and, in response to this contention, the District Court found as follows:

> "Almost all persons with low certifications have been hired from the local population just before the school year opened, after efforts to obtain better qualified persons, black or white, had failed to fill the ranks. The small percentage of black persons in Charles County who have a college education, as compared with white persons who have a college education is the reason why relatively few of them have been hired. In the last four years only twelve persons with low certifications or no degree have been hired; of those nine were white and three were black." App. C, p. 25a; 373 F. Supp. at 398.

Fourth, petitioners state that assignments of teachers were made on the basis of race, but the District Court

found that "[t]he tables show that Charles County has been moving toward the goal [of faculty racial balance] with reasonable speed", and the Court found it would not be appropriate to issue an injunction. App. C, p. 30a; 373 F. Supp. at 401. Further, the Board of Education had obtained an appropriate faculty ratio in all but five of its twenty-six schools, and at one of the five imbalance was caused by the need for specialized faculty. Of the remaining four, in three schools the shifting of one teacher only would be necessary to meet the test suggested by petitioners. In the case of the other school, the shifting of two teachers would meet the test. The situation was thus not an aggravated one.

Statistical data must be analyzed closely to determine whether it is a meaningful indicator of racial discrimination in a particular case. Alleged statistical conclusions should be rejected where they lack substance. In *Mayor v. Education Equality League,* 415 U.S. 605 (1974) this Court reversed the Court of Appeals and upheld the district court's conclusion that percentage comparisons of the racial composition of a 13 member nominating panel and of the population of Philadelphia were unreliable, saying 415 U.S. at 620-21:

> "But the simplistic percentage comparisons undertaken by the Court of Appeals lack real meaning in the context of this case.
>
> * * * * * *
>
> "In sum, the Court of Appeals' finding of racial discrimination rests on . . . racial-composition percentage comparisons that we think were correctly rejected by the District Court as meaningless. In our view, this type of proof is too fragmentary and speculative to support a serious charge in a judicial proceeding."

The Court of Appeals was correct in giving due regard to Judge Thomsen's opportunity to judge the

credibility of witnesses (F.R.C.P. 52(a)) and to interpret the facts in the context in which they occurred, without being limited to the printed page. See *Mayor v. Educational Equality League, supra,* 415 U.S. at 621, fn. 20.

II.

THE SO-CALLED CHAMBERS RULE WAS NOT APPLICABLE.

An inference of discrimination is raised only where there has been both a history of racial discrimination *and* a sudden, disproportionate decimation in the ranks of black teachers at the time of desegregation. This Court stated the rule as follows in *Keyes v. School District No. 1 Denver, Col.,* 413 U.S. 189, 209 (1973):

> "Again, in a school system with a history of segregation, the *discharge* of a disproportionately large number of Negro teachers incident to desegregation 'thrust[s] upon the School Board the burden of justifying its conduct by clear and convincing evidence.' *Chambers v. Hendersonville City Board of Education,* 364 F.2d 189, 192 (4 Cir. 1966) (en banc)." (emphasis supplied)

In the instant case there was no sudden, disproportionate decimation in the ranks of black teachers nor was there a ". . . discharge of a disproportionately large number of Negro teachers incident to desegregation . . ." 413 U.S. at 209. In fact not one black teacher or principal was discharged, and the number of black teachers and principals actually increased over a period of several years. As found by the District Court:

> "In the instant case there is no claim or evidence that any teacher or principal was discharged because of his or her race." App. C., p. 29a; 373 F. Supp. at 400.

Further, there is no history of segregation since the *Brown* cases in the Charles County public schools. Rather, there is a history of voluntary efforts, first to integrate and then to desegregate fully, well in advance of judicial decisions requiring affirmative action of the type taken.

Consequently, on the facts of this case, the *Chambers* rule is not applicable.

III.

IN FINDING THAT THE EVIDENCE DID NOT DISCLOSE A PATTERN OR POLICY OF DISCRIMINATION, THE COURTS BELOW NECESSARILY FOUND THAT THE EVIDENCE DID NOT SHOW A DISCRIMINATORY EFFECT.

After reviewing all of the statistical evidence, the history of desegregation efforts for the Charles County public schools, and the administrative pronouncements and the Board's reaction thereto, the District Court concluded:

> "The evidence does not show a pattern of racial discrimination. See particularly the facts set out above under the headings 'Principals and Other Administrators' and 'Recruiting and Hiring Teachers.'" App. C., p. 28a; 373 F. Supp. at 400.

In other words, without reaching the question of the Board's intent or motivation, the District Court concluded as a matter of fact that no discriminatory effect had been shown, *i.e.* no pattern of discrimination existed. Further, the effect test in *Wright v. Council of City of Emporia,* 407 U.S. 451 (1972) requires action by the Board which has a discriminatory effect, and the District Court found ". . . that the policies of defendants with respect to the recruiting and hiring of teachers does not tend to prove a policy of racial discrimination." App. C., p. 26a; 373 F. Supp. at 399. Consequently, the effect test of *Wright* is fully satisfied.

IV.

THE COURTS BELOW CORRECTLY MADE INDEPENDENT FINDINGS OF FACT AND LAW BASED ON THE EVIDENCE AND WERE NOT BOUND BY STATEMENTS OF THE AD HOC COMMITTEE APPOINTED BY THE STATE BOARD OF EDUCATION.

As pointed out in the opinions of the courts below and in the Statement, *supra,* the *ad hoc* committee, on whose report petitioners rely so heavily, was not charged to apply either constitutional or statutory standards to its investigation, did not conduct an adversary proceeding, did not have its factual conclusions adopted by the State Board of Education, and had some of its policy recommendations adopted, some modified and some rejected by the State Board. The *ad hoc* committee's report was admitted into evidence, but the evidence before the District Court did not support its findings. See the Court of Appeals opinion, App. A., pp 8a-9a; 520 F.2d at 875-76.

This was not a proceeding to enforce an order of the State Board, and the State Board had issued no order to enforce. Under the circumstances the District Court was bound to make its own findings of fact based on all the evidence. The *ad hoc* committee's report was ". . . in no sense binding on the district court and is to be given no more weight than any other testimony given at trial." *Smith v. Universal Services, Inc.,* 454 F.2d 154, 157 (5 Cir. 1972).

CONCLUSION

Since no important issue is raised on the facts of this case as found by the courts below and as supported solidly by the record, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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